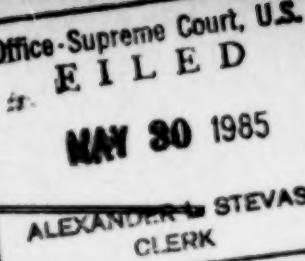


No. 84-1044



2
In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From the Supreme Court of California

**BRIEF OF SIERRA PACIFIC POWER COMPANY
AS AMICUS CURIAE IN SUPPORT OF APPELLANT**

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Sierra Pacific Power Company ("Sierra Pacific") respectfully submits this brief as amicus curiae in support of Appellant Pacific Gas and Electric Company ("PG&E"). The parties have given their written consent to the filing of this brief, and copies of the letters of consent have been filed with the clerk of this Court.

STATEMENT OF THE CASE

The California Public Utilities Commission ("PUC") has ordered PG&E to insert in PG&E's billing envelopes materials submitted by a private consumer representative organization called Toward Utility Rate Normalization ("TURN"). *TURN v. PG&E*, Decision No. 83-12-047 (Cal. PUC Dec. 20, 1983)¹ modified by *TURN v. PG&E*, Decision

¹Reproduced in Appendix to the Jurisdictional Statement of Appellant Pacific Gas and Electric Company ("App."), A-1.

No. 84-05-039 (Cal. PUC May 2, 1984). App. at A-45. The PUC order requires PG&E to insert TURN's material in the "extra space" in PG&E's billing envelopes four times per year over the next two years. "Extra space" is defined by the PUC as the space remaining in the billing envelope, after inclusion of PG&E's monthly bill and any required legal notices, which could be filled without having to pay additional postage. App. at A-3.

PG&E sought California Supreme Court review of the PUC's order on the grounds, among others, that the order violated the First and Fifth Amendments to the United States Constitution. By Order dated October 4, 1984, the California Supreme Court, without the full record before it and without hearing, denied PG&E's petition for writ of review. App. at A-73. PG&E appealed to this Court, which noted probable jurisdiction on March 25, 1985.

INTEREST OF THE AMICUS CURIAE

Sierra Pacific is an investor-owned public utility engaged in the generation, purchase, transmission, distribution and sale of electric energy in Nevada and California. The company, incorporated in Nevada, provides electric service in an area part of which is in California and part of which is in Nevada. In addition, the company provides gas and water service in Nevada. It is subject to the jurisdiction of the PUC and the corresponding Public Service Commission of Nevada ("Nevada Commission"). It mails bills to electric customers in both California and Nevada. All of its bills are prepared at one billing center in Nevada without regard to state residence of the customer.

Unless the PUC's order is struck down, the PUC can be expected to issue a similar order directed at Sierra Pacific, and the Nevada Commission can be expected to

take a similar step but with an order reflecting the circumstances of Nevada. Thus, in addition to finding itself required to obey orders which the company believes violate its constitutional rights, Sierra Pacific could be caught facing incompatible directives concerning the same extra space.² Even if the Nevada Commission were to issue an order compatible with that of the PUC or were to refrain altogether from issuing an order on use of billing envelopes, Sierra Pacific could be forced to reorganize its entire billing system and to participate in wrangling over the extra space. Thus, as to Sierra Pacific, the PUC's order together with whatever action the Nevada Commission may take could raise separate questions of unlawful interference with interstate commerce.

Sierra Pacific supports PG&E in its appeal from the PUC's order, and requests this Court to strike down that order. Sierra Pacific agrees with PG&E that the PUC's order violates the First Amendment to the United States Constitution for the various reasons presented in PG&E's Jurisdictional Statement and brief, and especially for the reasons set forth herein. In addition, the PUC's order violates the prohibition in the Fifth Amendment against taking private property without just compensation. This issue too was raised by PG&E below and in its Jurisdictional Statement. Jurisdictional Statement at 7-9.

SUMMARY OF ARGUMENT

The PUC's order violates the First Amendment because it impermissibly regulates the content of speech by determining whether particular viewpoints are meritorious, and

²The Nevada Commission has already instituted a rulemaking proceeding to consider whether it has jurisdiction over the extra space and, if so, to consider what rules it should issue. *In Re Investigation of Commission Jurisdiction over Extra Space in Utility Billing Envelopes*, Docket No. 84-1129, (Notice dated Jan. 7, 1985).

by determining whether particular proposals have educational value. The PUC's order fails to meet the constitutional requirements reiterated in *Regan v. Time, Inc.*, 52 U.S.L.W. 5084, 82 L. Ed. 2d 487 (1984). The PUC cannot rely on the proposition that under the First Amendment the state may lawfully fix a time, place or manner for speech so long as the state refrains from regulating content.

Next, the PUC cannot rely on the proposition that under the First Amendment speech content may indeed be regulated if a compelling state interest is satisfied, and if, in addition, there are no more narrowly tailored, less drastic means to satisfy that interest. The PUC's declared interest, of assuring the fullest possible consumer participation in rate proceedings and the most complete understanding of energy-related issues, is not "compelling" within the meaning of this Court's First Amendment decisions. Even if the declared interest were compelling, the granting of access to billing envelopes to partisan groups is at most a clumsy method of satisfying that interest. Moreover, there are more narrowly tailored and less drastic means by which that interest can be served.

Finally, the PUC cannot rely on the proposition that the envelope space is a "nonpublic forum" to which the state may, without violating the First Amendment, regulate access for purposes of speech. The proposition does not extend to private property, including the utility's billing envelopes. *Perry Education Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 49-50, n.9 (1983). A private utility's billing envelope, including extra space, is its private property and customers do not have any legal or equitable interest therein. *Board of Public Utility Commissioners v. New York Telephone Company*, 271 U.S. 23, 32 (1926). Further, the PUC's authority does not extend to allow it to create a "nonpublic" forum in the utility's private property.

ARGUMENT

I

THE PUC'S ORDER VIOLATES THE FIRST AMENDMENT BECAUSE IT IMPERMISSIBLY REGULATES THE CONTENT OF SPEECH BY DETERMINING WHETHER PARTICULAR VIEWPOINTS ARE MERITORIOUS

The First Amendment is "hostile" to content-based regulation of speech. *Consolidated Edison v. Public Service Commission*, 447 U.S. 530, 537 (1980). This Court has recently reaffirmed that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 52 U.S.L.W. 5084, 82 L. Ed. 2d 487, 494 (1984). That decision reaffirmed that the government may impose time, place, and manner regulations for speech provided such regulations are in no way based on the content or subject matter of the message; the regulations must be content-neutral. *Id.*

When the PUC originally invited TURN to request use of the extra space, the PUC admitted that orders such as the one it ultimately issued would face "considerable First Amendment problems." App. at A-4, quoting *Application of Pacific Gas and Electric Company*, Decision No. 93887 (Cal. PUC Dec. 30, 1981) partially reprinted in App. at A-63 *et seq.* In an attempt to overcome those problems, the PUC asserted that its order was a reasonable time, place, or manner restriction that did not involve regulation of the content of speech. App. at A-21. According to the PUC, "[t]he proposal does not require the Commission to look at content at all . . . the proposal as we adopt it is neutral as to content of the parties' messages and, therefore, meets [the] subject matter standard." *Id.* In the same vein, the PUC asserted that "[i]t was not our intent then, nor is it now, to involve ourselves in judging the relative merits of the speech of different factions." *Id.* at A-8.

Despite these assertions the PUC clearly states elsewhere in the order its intention to evaluate speech content:

Should other proposals [for use of the extra space] be brought before us, we will consider the feasibility and benefits of each at that time. If we find that these proposals are meritorious, we could order that extra space be made available for the new program....

Id. at A-19 (emphasis added). By the PUC's own admission, it determined that

TURN's proposals are *meritorious*. Under each proposal, residential ratepayers . . . would be given an opportunity to be informed of and to support, advocacy efforts on their behalf through use of the extra space . . . [w]e believe that this would be *an appropriate . . . use* of the extra space.

Id. at A-16 (emphasis added). In considering whether to allow TURN's inserts into the extra space, the PUC considered the "*positions which TURN takes* regarding PG&E" and considered whether those positions are shared by ratepayers. App. at A-15 (emphasis added). The PUC specifically considered TURN's view that PG&E's "rate of return and valuation of rate base [should be kept] relatively low." *Id.* Next, the PUC examined the positions TURN takes "[a]s to issues such as rate design and energy conservation subsidies." *Id.*

Thus, the PUC's order on its face demonstrates that the PUC granted access to TURN based on the positions which TURN takes and the viewpoints which TURN espouses. Government decisions as to speech which are based on speakers' positions or viewpoints on issues are decisions unconstitutionally based on the content of speech.

That the PUC has by its order undertaken to regulate speech content and to play the role of censor, despite its protests to the contrary, is evidenced by the fact that the PUC has already begun to make content-based deci-

sions respecting access to PG&E's billing envelopes. In *Committee of More Than 1 Million Taxpayers to Save Prop. 13 v. Pacific Gas and Electric Company et al.*, Decision No. 84-10-062 (Cal. PUC Oct. 17, 1984) reprinted in App. at A-157, the PUC excluded complainant Committee from the extra space because the PUC ascribed insufficient merit to the Committee's proposal to "include informational inserts" regarding Proposition 36, a referendum on the November, 1984 ballot in California. *Id.* at A-159, A-161. The Committee had stated its position on Proposition 36 to the PUC and had requested access to the extra space to communicate information regarding that position. *Id.* at A-158. The PUC evaluated the Committee's stated position and then considered whether the ratepayers would be benefited enough by the Committee's proposal to warrant inclusion of the insert. *Id.* at A-158, A-161. The PUC decided to exclude the Committee's insert from the extra space. *Id.* at A-161. The PUC based its order denying the Committee access to the billing envelopes on the positions the Committee was taking and the viewpoints the Committee was espousing.

If the PUC's order is allowed to stand, other groups will clamor for use of the extra space. Their viewpoints will span a wide breadth of opinion on a potentially limitless list of issues ranging from elimination of private ownership of public utilities to creation of special rates according to the needs of particular industries or value of end use.³ Thus, the PUC's order requires it to continue making content-based evaluations in the future.

³The PUC's regulation and content in this case is especially troubling because by requiring TURN's materials to be inserted in the utility's billing envelope, those materials enjoy a stamp of legitimacy which would otherwise be absent. The result is that, through the government's choice of what groups may use a utility's envelopes and for what purpose, the government is in the position of shaping and directing public debate.

II

THE PUC'S ORDER VIOLATES THE FIRST AMENDMENT BECAUSE IT IMPERMISSIBLY REGULATES THE CONTENT OF SPEECH BY DETERMINING WHETHER PARTICULAR PROPOSALS HAVE EDUCATIONAL VALUE

The PUC's order violates the First Amendment by making an impermissible assessment of the educational value of speech. This Court held in *Regan v. Time, Inc.* that it is unconstitutional for the state to make determinations based on the educational value of a speaker's message. 52 U.S.L.W. 5084, 82 L. Ed. 2d at 494. In *Regan*, this Court recognized that

[a] determination concerning the newsworthiness or educational value . . . cannot help but be based on the content . . . and the message it delivers. . . .

[O]ne will be allowed and another disallowed solely because the Government determines that the message being conveyed in the one is newsworthy or educational while the message imparted in the other is not.

Id. (emphasis added).

One of the PUC's stated purposes for its order is to educate consumers. Specifically, the PUC order adopted the PUC's justification in its earlier "UCAN" decision in which the PUC declared that one reason for ordering inclusion of certain material in the billing envelope was to assure "the most complete consumer understanding possible of energy-related issues." *Center for Public Interest Law v. San Diego Gas & Electric Co.*, Decision No. 83-04-020 (Cal. PUC Apr. 6, 1983) reprinted in App. at A-90, A-103 ("UCAN decision") (emphasis added). See App. at A-22.⁴ Whenever the PUC decides which pro-

⁴In relying on the above quoted language in the UCAN decision the Commission quoted the above words but left out the word "consumer," presumably inadvertently. The UCAN decision declares that the goal is to assure "the most complete consumer understanding." *Id.* at A-103 (emphasis added).

posals for use of the extra space are "meritorious" enough to warrant inclusion in the utility's billing envelopes, it is deciding which proposals have sufficient educational value for the consumers' "benefit." See App. at A-19.

The statutory provision held unconstitutional in *Regan v. Time, Inc.* was one allowing certain speech if it was for an educational purpose and disallowing it if it was not. 82 L. Ed. 2d at 492. The PUC admits that it will assess the benefits and merits of material proposed for the extra space, App. at A-19, and will allow inclusion of that material if it sufficiently serves the state's purpose of educating consumers. This is indeed a case in which the PUC impermissibly regulates speech and plays the role of educational censor. As this Court held in *Regan v. Time, Inc.*, such regulation of speech cannot be tolerated under the First Amendment. 82 L. Ed. 2d at 494.

III

THE PUC'S ORDER VIOLATES THE FIRST AMENDMENT BECAUSE THE PUC HAS NOT SHOWN A COMPELLING STATE INTEREST PURSUED BY NARROWLY TAILORED MEANS

The government may regulate speech without violating the First Amendment (a) provided such regulation is necessary to further or protect a compelling state interest and (b) provided the regulation is narrowly tailored to accomplish that result and (c) provided there is no alternative which is less drastic. *Wooley v. Maynard*, 430 U.S. 705, 715-717 (1977). See *Consolidated Edison v. Public Service Commission*, *supra*, 447 U.S. at 535.

The PUC's asserted interest is not compelling. The PUC sets forth the state's interest as follows:

The State interest, of course, is the assurance of the fullest possible consumer participation in [PUC] proceedings and the most complete consumer understanding possible of energy-related issues.

App. at A-103. See Note 4, *supra*.

It strains credulity that such claimed interest is "compelling." The PUC's constitutional and statutory function is not to obtain assurance of full consumer participation, nor to educate ratepayers on rate issues. While those goals may be desirable, the PUC's lawful function is to issue orders to assure adequate utility service at reasonable rates.

In all its seventy years, the PUC has fixed rates without bill inserts from consumers and without mass attempts to educate the public. It has pursued an open-door policy in allowing interested consumers and consumer groups to appear and participate in rate proceedings. It has developed a staff which now numbers over 700, many of whom are trained as experts in economics, engineering, and rate design. The PUC draws heavily upon their knowledge. In sum, the PUC's experience and resources enable it to issue orders assuring adequate service at reasonable rates.⁵

Even if it were accepted that the PUC's asserted interest is compelling, the PUC's order is unlawful because there are more narrowly tailored and less drastic measures available to encourage consumer participation in PUC proceedings and to educate consumers on energy-related issues. If the PUC really wanted to accomplish "the most complete consumer understanding possible" it would certainly not want to rely on bill inserts from partisan groups. On the contrary, it would itself conduct seminars, write informative papers, give lectures, hold debates and perhaps even conduct educational courses.

⁵The PUC's order enhances the relative voice of TURN and restricts that of PG&E, which is denied access to the extent TURN's materials are sent out in the extra space. It is unconstitutional under the First Amendment for the government to enhance one voice relative to another, *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976), and such an unconstitutional objective cannot be a "compelling state interest."

Current PUC practice already adequately encourages consumer participation in PUC proceedings. The PUC requires public notice of hearings and accepts appearances and evidence on a liberal basis. In addition, under the federal Public Utility Regulatory Policy Act (PURPA), 16 U.S.C. § 2623, *et seq.*, and California Public Utilities Code Section 1801, the PUC has power to order utilities to pay fees and expenses to participants in rate cases when a significant contribution to the rate case can be shown. Such awards have been made to various consumer groups, including TURN. App. at A-15 n.5. Unlike the access to billing envelopes which the PUC grants by its order, fees and expenses awarded for participation in rate hearings bear direct relation to such participation and do not infringe First Amendment rights.

In sum, the PUC has broad powers and unique capabilities to encourage ratepayer participation in rate hearings and to educate and inform the public, all without infringing First Amendment rights.

IV

THE PUC'S ORDER VIOLATES THE FIRST AMENDMENT BECAUSE IT IMPROPERLY ATTEMPTS TO CREATE A NONPUBLIC FORUM IN THE UTILITY'S PROPERTY

There are three types of forums which this Court has recognized in its First Amendment cases. First, there are "traditional" public forums such as "streets and parks which 'have immemorially been held in trust for the use of the public for purposes of assembly, communicating thought between citizens, and discussing public questions.'" *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983), quoting *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939). The extra space is clearly not a traditional public forum, since the space inside the billing envelope has never been used by anyone but PG&E.

The second type of forum is the "designated public forum." It "consists of *public* property such as a city auditorium which the State has opened for use by the public as a place for expressive activity." *Perry, supra*, 460 U.S. at 45 (emphasis added). The PUC has recognized and stated to this Court that "this is not a 'public forum' case." *Motion to Dismiss* at 20, 22. Similarly, in *Committee of More Than 1 Million (etc.), supra*, App. at A-160, the PUC stated that it "did not intend to create a public forum" by its order regarding use of the extra space.

Third, there is the "nonpublic" forum. It consists of *public* property to which the government may give access for particular speech or other expressive activity, even though such public property "is not by tradition or designation a forum for public communication." *Perry, supra*, 460 U.S. at 46 (emphasis added).

The PUC's claim that the extra space is a nonpublic forum subject to its regulation is a post-hoc rationalization offered by the PUC in its attempt to defeat PG&E's appeal to this Court. See *Motion to Dismiss* at 20. It is a rationalization which produces an unconstitutional result.

A. There Cannot Be A Nonpublic Forum in the Billing Envelope, Including Any Extra Space, Because It Is the Utility's Property

Only *public* property may be a nonpublic forum to which the government may grant access. For example, in *Perry, supra*, 460 U.S. at 46-47, the government granted to one group but not another access to a government-owned interschool mail system. Similarly, the government granted access, for purposes of speech, to one speaker but not another where the property to which access was sought was a military base. *Greer v. Spock*, 424 U.S. 828, 838 (1976). Cf. *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114 (1981)

(letterbox owner's commitment of letterbox to Postal Service's nationwide system for mail delivery, in exchange for Postal Service's agreement to deliver and pick up mail, did not transform letterbox into a limited public forum).

The PUC's order granting TURN access to the extra space violates the First Amendment because the property in question is owned by the utility, not by the state. This Court has consistently held that by paying bills for service, utility customers do not acquire any interest in property purchased by the utility for the conduct of its business. Thus, in *Board of Public Utility Commissioners v. New York Telephone Company*, 271 U.S. 23 (1926), this Court said that "[b]y paying bills for service [customers] do not acquire any interest, legal or equitable, in the property used for their convenience. . . . Property paid for out of moneys received for service belongs to the company. . . . Customers pay for service; not for the property used to render it." *Id.* at 32. As the Court stated in *United R. & Electric Co. v. West*, 280 U.S. 234 (1930), ". . . the property of a public utility, although devoted to the public service and impressed with a public interest is still private property; . . ." *Id.* at 249, *overruled on other grounds*, *Federal Power Com. v. Hope Nat. Gas Co.*, 320 U.S. 591, 606-607 (1944) (overruling previous decision as to proper method for calculating depreciation).

Consistent with the above decisions, this Court's opinion in *Consolidated Edison v. Public Service Commission*, 447 U.S. 530 (1980) assumes in the course of its First Amendment analysis that utility billing envelopes belong to the utility. *Id.* at 540. In that case, this Court contrasted the defendant's attempted regulation of utility bill inserts with cases where private parties sought to use public property and observed that the utility sought "merely to utilize its own billing envelopes to promulgate its views."

Id. at 539-540 (emphasis added). This Court in the *Consolidated Edison* case which, as here, involved First Amendment rights with respect to inserts in utility billing envelopes, expressly distinguished the First Amendment forum cases. *Consolidated Edison, supra*, 447 U.S. at 539-540. See *Perry, supra*, 460 U.S. at 49-50, n.9.

This Court's most comprehensive analysis of First Amendment forum principles is found in the *Perry* case. The Court enunciated in detail the principles that govern requests for access to property for the purpose of engaging in speech or other expressive activity on that property. All of the instances in which the Court declared a non-public forum might be found involved government-owned property. *Perry, supra*, 460 U.S. at 49 n.9. A nonpublic forum is "public property" which is not a traditional or designated public forum, but which the State may reserve for communicative purposes. *Perry, supra*, 460 U.S. at 46 (emphasis added). The necessary prerequisite of a nonpublic forum is that the property to which access is sought must be public property. *Id.*

In its findings of fact, the PUC itself described what TURN sought as "access to the PG&E billing envelope." App. at A-30. The PUC admits the billing envelopes to which access is sought are the utility's property, since the PUC "did not adopt the idea that the envelope itself is ratepayer property. . . ." App. at A-2, A-3. The PUC has further admitted before this Court that the utility is the "sole owner of its customer list." *Motion to Dismiss* at 18 (emphasis added). In effect, the PUC's order forces the utility to accept third party intrusions into property which the PUC admits is owned by the utility in order to communicate a message to utility customers on a list which the PUC admits is solely owned by the utility.

To summarize, a necessary prerequisite to a nonpublic forum is absent because the property to which access is sought is not public property. Therefore, the PUC's order,

as characterized by its post-hoc rationalization offered to this Court, is an unconstitutional attempt to create a non-public forum in the utility's billing envelope.

B. The Envelope Is Not So Controlled By the PUC As To Allow It To Create a First Amendment Forum in the Extra Space

The PUC has suggested that its control over utilities allows it to create a nonpublic forum in the billing envelope. *Motion to Dismiss* at 21. This argument is unpersuasive.

This Court has held in one case that certain private property may be so controlled by government that government may *deny* third parties' requests for access to the property. *Council of Greenburgh, supra*, 453 U.S. 114 (Postal Service could deny third party requests for access to privately owned letterboxes). That case is not, however, authority to support the PUC's action.

Council of Greenburgh involved a special situation. The Court in that case found justification for the Postal Service's authority to *deny* third party access to private letterboxes in the unique historical role of the government in mail delivery. The federal government is expressly authorized in the Constitution to govern the mails. U.S. Const. Art. I § 8. Moreover, this Court established over a century ago that the power vested in "Congress embraces the regulation of the entire Postal System of the country [including] the right to determine what shall be excluded." *Council of Greenburgh, supra*, 453 U.S. at 126, quoting *Ex parte Jackson*, 36 U.S. 727, 732 (1878). As this Court stated, the private letterbox owner "agrees to abide by the Postal Service's regulations in exchange for the Postal Service agreeing to deliver and pick up his mail." *Id.*

The present case is in stark contrast to the *Council of Greenburgh* case. The source upon which the PUC purports to rely for its order is not an express constitutional

or statutory mandate but a general authority to regulate utilities. Utilities do provide service in a field affected with a public interest and are regulated to ensure that service is adequate, but utilities are nevertheless private companies owned by the shareholders. They have dedicated their property to providing utility service, but not to providing a forum for speech. The authority of the PUC is comprehensive in regulating utility service, but does not extend to force the utility to provide a forum for speech.

CONCLUSION

The PUC's order if allowed to stand will provide the impetus for the PUC and other state regulatory bodies to issue similar orders directed at other utilities. Because the order violates the First Amendment, and the Fifth Amendment as well, it should be struck down.

Respectfully submitted,

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